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Supreme Court, U.S.
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No. 00-792

IN THE

Supreme Court of the United States

ANTONIA J.H. ELKINS

Petitioner

v.

PHARMACY CORPORATION OF AMERICA, and KEITH ANDERSON

Respondents

On Petition for Writ of Certiorari
to the U.S. Court of Appeals for the Fourth Circuit

REPLY TO BRIEF IN OPPOSITION

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Rebuttal to Respondents' Counter-Statement of the Case

The Respondents, Pharmacy Corporation of America, Inc. (hereinafter "PCA") and Keith Anderson (hereinafter "Anderson") center their opposition to Petitioner's brief on the allegations in Part C of their brief titled "Sup. Ct. Rule 15.2 Petitioner's Misstatements of Law and Facts" (Brief in Opposition, p. 6) and claim incorrectly that "The Petition is replete with misleading representations of the facts in the record, which prevents this Court from assessing the propriety of the decisions of the lower courts." Petitioner (hereinafter, "Ms. Elkins") categorically denies making any misstatements in her recital of the facts, but would note that Respondents' brief serves to highlight Ms. Elkins's claim that dismissal under Rule 56 was improper. Every fact claimed by Ms. Elkins is supported by admissible evidence. Respondents' recital of her "misstatements" of the facts is disingenuous at best. For all their outrage at Ms. Elkins's recital of the facts, Respondents present not a single exhibit to this Court in rebuttal of her facts.

Discussion

The Respondents have attempted to characterize this case as merely a sexual harassment case, and argue that under the EEOC guidelines and pertinent case law, it cannot succeed because there was only one sexual incident, and therefore by definition there could not have been a hostile work environment. Respondents minimize the one incident they concede to have occurred (Anderson's invitation to Hooters) asserting in the carefully crafted words of Human Resources Director James W. Brennan (hereinafter "Brennan")

that "the invitation was made in jest among kidding going on among all parties" (Petition, p. 3n - one can only wonder where Brennan got *that* characterization from - none of the people present ever described it that way).

In contrast, Ms. Elkins states that she protested what she perceived as an inappropriate invitation, stating forthrightly to Anderson as well as to Stevens that it could be viewed as sexual harassment, that he flushed with embarrassment at her refusal and her strong words, and that thereafter his attitude toward her changed radically - that in retaliation he undertook a course of mistreatment which led to her involuntary resignation and subsequent termination. The question is not a simple matter of whether Anderson's invitation to Hooters constituted sexual harassment; it is whether Ms. Elkins engaged in a protected activity by, in emphatically refusing the invitation, explicitly protesting it as such. It is not whether the subsequent treatment of her was intolerable if it did not involve sex-linked harassment per se, but whether she was singled out for retaliatory treatment that could be linked to her protest and amounted to constructive discharge. Whether any sexual harassment actually occurred is irrelevant to this case beyond that his anger at the charge was what motivated Anderson's subsequent conduct.

The Respondents contend that Ms. Elkins misstates the facts in claiming she availed herself of the company's grievance procedure. Ms. Elkins replies that the first step in the procedure was to protest to the immediate supervisor, that Anderson was not only her

immediate supervisor but the highest level of supervision at PCA's Beltsville facility, and that by company policy if the problem appeared to be resolved, there was no requirement to go further. In giving notice of her resignation, she characterized the Hooters incident as sexual harassment, and charged Anderson with retaliation. When she was contacted by Brennan, she discussed fully her reasons for tendering her resignation. Before accepting Ms. Elkins's resignation, Brennan promised an investigation. In fact, he discussed with Corporate Counsel whether a possible complaint of sexual harassment on the part of Ms. Elkins was likely to succeed, as evidenced by Respondents' own exhibit (as may be inferred from an extensively edited version of Brennan's letter to Ms. Elkins, the unedited version of which was provided in her petition as Appendix N) and the interview with Janet Rutkowski, PCA regional vice-president. Ms. Elkins introduced nothing new in observing that PCA didn't meet its duty to protect her against sexual harassment and retaliation, and in fact assisted in her termination. Throughout the whole relationship, PCA has been far more concerned with limiting its legal liability and insulating itself from suit (Ms. Elkins was not even contacted for any rebuttal of Anderson's and Stevens's statements about her).

The Respondents are at pains to emphasize that Ms. Elkins was an at-will employee (the consequence of a form clause) and hence has no grounds on which to pursue her allegations of breach of contract, abusive discharge or tortious interference with contract, since she resigned "voluntarily" (belied by virtually every word of her notice of resignation). However, the

Pharmacy Manager at Beltsville who hired Ms. Elkins, Barry Roberts, certainly must have been delegated the authority to make her a formal, written offer of certain specific terms and conditions of employment, which she accepted in writing; Anderson, who succeeded Mr. Roberts before Ms. Elkins actually began her employment on July 8, 1996, explicitly confirmed the agreement at a meeting with her. Ms. Elkins made no "misstatement" concerning the terms of what both she and PCA's authorized agent regarded as a contract. She states she was well aware that the job involved travel, and that at least once a month there would be "overnights" at two or three-day training sessions: she elicited PCA's agreement that THEREFORE she could work from home, on call to the Beltsville facility, with freedom to set her own schedule, in order TO AVOID GOING TO BELTSVILLE DAILY and have as much time as possible with her two young boys, then 8 and 3 years of age. To this end, she was provided all the modern electronic equipment necessary to keep in close touch with supervision; and in fact there was actually no office space for Ms. Elkins at Beltsville. HAD SHE NOT BEEN ASSURED OF THE ABILITY TO DO A GREAT DEAL OF WORK AT HOME, MS. ELKINS WOULD NOT HAVE ACCEPTED THIS JOB. In return, Petitioner was expected to create and maintain good rapport with the Directors of Nursing (hereinafter "DONs") at 23 nursing homes served by PCA, provide desired IV training to nursing staffs, and increase sales of IV equipment - her continued employment was explicitly conditioned on good performance in these areas. The record shows that in the three months she worked for PCA, Ms. Elkins traveled extensively, conducted many seminars, and

routinely worked well in excess of 40 hours per week. She did not object to being on call for necessary visits to the Beltsville facility, though it was an hour's drive from her home, and routinely went there to attend meetings.

Ms. Elkins objected to lengthy unnecessary visits to Beltsville. When ultimately, Anderson put her on notice that he meant to call her into the office with increasing frequency - daily if he wished, it was a major change in the terms of her employment. Ms. Elkins believes that by these means he fully intended to willfully disrupt her preparation for the training sessions on which the Directors of Nursing (DONs) would evaluate her performance.

Ms. Elkins had always fully accepted travel as an integral part of the job: she objected to Anderson's decision, conveyed to her in a telephone conversation of October 18, 1996, that she would thereafter no longer be allowed to count hours spent in necessary travel ("drive time") toward the 40-50 hours of work that PCA required as a minimum every week - thus radically extending her hours of work. Ms. Elkins informally canvassed other exempt employees (as she discussed in her sworn answers to Defendants' interrogatories) and learned that no one else had ever been treated thus (and the same is confirmed by the depositions of Anderson and Stevens). PCA hasn't denied that Anderson told Ms. Elkins that she couldn't count "drive time," nor did they tell Anderson he couldn't treat her that way - they simply insist that it didn't matter.

Respondents again allege, as they have before, that Ms. Elkins, as a salaried employee exempt from wage and hour laws, was not required "to work a set period of time to be entitled to her salary, *provided she accomplished her job duties*. At no time while Elkins was employed by PCA was her compensation reduced or in any way modified because she worked less than forty (40) hours in a workweek." (Opposition, p. 2., emphasis added.) Clever language, but it does not speak to the future - up to October 18, 1996, Petitioner had never worked less than 40 hours in a week, including "drive time." There is plenty in the record to indicate that PCA would not have tolerated a diminution in the number of hours reported as worked: the paper Petitioner signed at hire acknowledging her obligation to work at least 40 hours per week (Petition, Appendix K); the Stevens deposition in which she cited the expectation as more like 50; the notes of Human Resources Director Brennan's investigation into Petitioner's allegations in which Anderson is quoted as telling Stevens that Petitioner did not want to work over 40 hours (Petition, Appendix P, wherein Brennan notes that Anderson commented that Ms. Elkins "insists on working *only* 40 hrs," emphasis added - obviously it may be inferred that to work less would be unacceptable).

Respondents claim that Ms. Elkins "misstates the facts" when she *argues* that others were given the information they needed (Opposition, p. 7), but not she, and state that "nothing in the record supports this statement." It is in the record that Ms. Elkins was not told by Anderson of requests by her clients (enteral quality assurance, three-day courses), that other "on-

call" employees made statements that Anderson was an effective supervisor and made efficient use of his employees time, that Anderson *interfered* with Ms. Elkins's efficient use of *her* time, that other employees were told of meeting locations and meeting cancellations when Ms. Elkins was not, that Anderson wanted Ms. Elkins to conduct training, even after her letter of resignation, but that he chose to fire her on the spot when he discovered that (due to his own acts) she did not have the materials to conduct the training. The record is *voluminous* and contains many more documents and statements and interviews than simply the depositions of Susan Stevens (the single person, by the way, other than Anderson, whose motives for truthfulness should be most suspect) and Janice Rutkowski, and it is dishonest of Respondents to represent to this court that Ms. Elkins has "blatantly" misstated the facts (Opposition, p. 7).

The sheer number of such incidents in a matter of weeks would make most reasonable people suspicious, but the capping incident occurred when regional Nurse Consultant Carl Prince angrily disrupted Petitioner's presentation to a meeting of 20 DONs on October 17, 1996, by stating that he wanted only three-day training seminars, and had told PCA so; why therefore was Elkins offering anything else? The person he had to have told at PCA was Anderson; Anderson had clearly not told Petitioner. This was more than a mere passing "embarrassment." Prince conveyed indelibly to the DONs the totally incorrect impression that Ms. Elkins was stubbornly refusing to provide three-day sessions, when in fact she thought that three-day sessions were preferable for distant

nursing homes such as his. Ms. Elkins's reputation was compromised with 20 very important people, only a few of whom she had as yet met, upon whose evaluation of her services her continuance with the company would depend. It is utterly erroneous for the lower courts to have judged this episode, in particular, as a "trivial incident endemic to employment." It was part of a pattern.

Was There "An Ultimate Employment Action" Taken Against Ms. Elkins?

PCA characterizes Ms. Elkins's allegation that she had indeed been terminated by PCA and not merely constructively discharged (contrary to the finding of the lower courts that "no ultimate employment action had taken place") as an attempt to "provide the Court with the requisite 'ultimate employment action' taken against her" by drawing "an inappropriate conclusion from a misleading statement of the facts," further describing these inferences as "unreasonable" and "far-reaching."

The inferences which Ms. Elkins drew from the events which followed her giving notice of her intended resignation are entirely reasonable. Ms. Elkins has never left a job without giving adequate notice to an employer; in this case, she expected to conduct two training seminars already scheduled. At the time she went to give the first of these seminars, she had not been told whether or not her resignation had been accepted; she thought consideration of it was pending in Human Resources. When she arrived at the nursing home to find no one expected her and that the materials she needed for the seminar had not been sent

from Beltsville, she called Anderson to clarify her status. He terminated her employment on the spot.

One may also infer that Anderson had set the stage for an eventual termination for cause in case Ms. Elkins didn't resign at once on October 18, when he announced his intention to disrupt her work schedule at his pleasure (in effect withdrawing the right to work at home) and lengthened her work hours by withdrawing the universal privilege of counting travel time as work time. Since he had previously set up three situations which he knew would cause Directors of Nursing to develop hostility to her or a lack of confidence in her, Ms. Elkins could anticipate more of the same - enabling him to state in her next evaluation that she had failed to correct the areas of deficiency he had speciously noted in her first evaluation (touted by PCA as showing no bias against Petitioner because he had rated her "above average").

Why the Writ Should be Granted

It is the primary duty of the lower courts to do justice, not merely expedite it in order to concentrate on the most significant or clear-cut cases. Familiar and useful paradigms can frustrate justice through careless application - or misapplication. Rule 56 sweeps a lot of cases out of the justice system - great care should be used in its exercise. Particularly critical is use of the "reasonable person." Why couldn't Ms. Elkins win on a constructive termination charge? Because a reasonable person, in the eyes of the trial judge, wouldn't have quit for the reasons advanced by Ms. Elkins. If Ms. Elkins's supervisor had made it a condition of continued employment that she consent to

have intercourse with him even once, she would have a case. Why should she have to tolerate something even more serious - the demand that she place her children's welfare at risk? Why shouldn't she be seen as forced to quit when told she must curtail her maternal contact with her three year old baby to keep a job that was becoming a mine-field of traps laid by her supervisor? She did not voluntarily leave - she loved the work. Was Anderson's action gender based? Emphatically yes.

Ms. Elkins prays that this court remand the case for a jury trial, or in the alternative issue a writ of certiorari to review the lower courts' decisions.

Respectfully submitted,

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